United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1423 74-8053

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. JOSEPH M. PAQUETTE,

Petitioner-Appellant,

-against-

J.E. LaVALLEE, Superintendent, Clinton Correctional Facility, Dannemora, New York,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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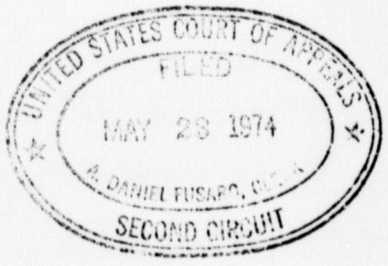
BRIEF FOR RESPONDENT-APPELLEE



LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee
Office and P.O. Address
Two World Trade Center
New York, New York 10047

BURTON HERMAN
Assistant Attorney General
of Counsel

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Question Presented

Does a trial judge act within the scope of his authority in declaring a mistrial where the disappearance of the prosecutor's witnesses could be attributed to the defendant?

Statement

This is an appeal from an order dated March 27, 1973 of the United States District Court for the Eastern District of New York (Bruchhausen, J.) dismissing a petition for a writ of habeas corpus.

Prior Proceedings

On July 1, 1969 at a term of the County Court, Suffolk County (Lundberg, J.) appellant was sentenced to an indeterminate term of imprisonment for the duration of his natural life after being found guilty of the crime of murder in the first degree by the verdict of a jury. Judgment of conviction was affirmed with opinion by the Appellate Division, Second Department, 37 A D 2d 999 and with opinion by the New York Court of Appeals. People v. Paquette, 31 N Y 2d 379 (Bergan, J.).

The material facts out of which appellant's double jeopardy claim arises are set forth in the New York Court of Appeals' opinion. There it is stated:

> "During the selection of the jury and before it was sworn, the prosecutor became aware of some difficulty in locating two witnesses and asked the police to locate them. There was a long holiday adjournment from the time the jury was sworn November 22 and the resumption of trial November 28 when the prosecutor for the first time, as far as the record shows, told the court the missing witnesses had been threatened and attributed their disappearance to the defendant.
>
> On the subsequent trial one of the witnesses whose disappearance had been noted in the November 28, 1967 application for mistrial, testified that he had left the State 'because my life had been threatened.'

Another witness testified she had left the State because defendant's uncle and another person had threatened her 'with a knife.'"

ARGUMENT

A TRIAL JUDGE ACTS WITHIN THE SCOPE OF THE BROAD DISCRETION VESTED IN HIM TO DECLARE A MISTRIAL WHERE THE DISAPPEARANCE OF THE PROSECUTOR'S WITNESSES COULD BE ATTRIBUTED TO THE DEFENDANT, AND THE APPELLANT WAS NOT SUBJECT TO DOUBLE JEOPARDY FOR THE SAME OFFENSE.

Appellant contends that the first trial was improperly discontinued. On the contrary, the trial judge acted within the scope of his authority in interrupting the trial. As the New York Court of Appeals ruled here:

> "This reason for inability of the prosecution to produce witnesses, which could factually be attributed to defendant himself, sharply distinguishes this case from Downum v. United States (372 U.S. 734, supra) where the absence of witnesses was attributed to the failure of the prosecutor to take reasonable steps to insure their presence (see 372 U.S., at p. 737).
>
> If the act of a defendant himself aborts a trial, he ought not readily be heard to say that by frustrating the trial he had succeeded in erecting a constitutional shelter based on double jeopardy.
>
> This is within the reasonable and rational scope of 'manifest necessity' (United States v. Perez, 9 Wheat. [22 U.S.] 579, 580), long

> recognized as justifying the interruption of a trial (see, e.g. Wade v. Hunter, 336 U.S. 684, 691)."

The foregoing ruling of the State's highest court is not inconsistent with the federal decisions. As it was stated in Illinois v. Somerville, 410 U.S. 458, 461-465 (1973) [in construing the nature of a court's authority to discharge a jury in cases of "manifest necessity for the act", or where "the ends of public practice would otherwise be defeated" as set forth in United States v. Perez, supra]:

> "This formulation, consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial. The broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this Court [citing doctrine in Wade v. Hunter, supra and Gori v. United States, 367 U.S. 364 (1961)]. . . . While the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question, cf. Downum v. United States, supra, such was not the situation in the above cases or in the instant case . . .This Court in reversing the convictions [in Downum v. United States, supra] on the ground of double jeopardy emphasized that 'each case must turn on its facts', 372 U.S. at 737, and held that the second prosecution constituted double jeopardy, because the absence of the witness and the reason therefor did not there justify in terms of 'manifest necessity', the declaration of a mistrial."

Appellant contends on the basis of the federal rule which was different from the New York rule that he was subject to jeopardy when the first jury was impaneled and sworn. However, even assuming that jeopardy attached at the first trial, he was not by virtue of the subsequent trial subject to double jeopardy for the same offense. As it was stated by the New York Court of Appeals:

> "Assuming, as we should, that the Federal rules governing jeopardy when trials are interrupted for one reason or another apply to State prosecutions (Somerville v. Illinois, 401 U.S. 1007, writ sustained on remand, 447 F. 2d 733, cert. granted March 20, 1972, 405 U.S. 987), the interruption of the first trial in the present case does not preclude further prosecution. On another aspect of the Federal rules, see United States v. Jorn (400 U.S. 470)."

CONCLUSION

THE ORDER SHOULD BE AFFIRMED.

Dated: New York, New York
May 23, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee

BURTON HERMAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and says that s he is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 23rd day of May , 1974 , she served the annexed upon the following named person :

NORMAN R. NELSON, ESQ.
Attorney for Petitioner-Appellant
1 Chase Manhattan Plaza
New York, New York 10005

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Susan D. Chieco

Sworn to before me this
23rd day of May , 1974

Burton Herman
Assistant Attorney General
of the State of New York